25 May 2012

AmCham EU's position on the Union Customs Code and the recast of the Modernised Customs Code

Context

This position statement consists out of five different components which are intended to be stand-alone positions. The five positions concern:

1. Customs valuation
2. Two step clearance procedure for centralised clearance
3. Reinforcing the single comprehensive guarantee
4. Transit simplification
5. Transitional arrangements for exchange and storage of data (Article 6)

Position 2, 3 and 5 relate specifically to the recast of the Modernised Customs Code (COM(2012) 64 final), which the European Commission has published on 20 February 2012. Position 1 and 4 relate to ongoing issues with the Union Customs Code and its implementing provisions.

POSITION STATEMENT

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Cover letter

The American Chamber of Commerce to the European Union (AmCham EU) has always given its full support to the underlying principles of what is currently referred to as the Modernised Customs Code (C/R 450/2008). The European Parliament and the Member States of the EU, when agreeing to the Modernised Customs Code, supported standardisation of IT systems, the harmonisation of procedures and the principle of the facilitation of trade where this was possible.

Given that work started on the Modernised Customs Code some 10 years ago, it is not surprising that the world has changed. Since it was adopted security issues, treaties and a financial crisis mean that we now live in a different world.

In early 2012, the European Commission agreed on the draft of a recast of the current Modernised Customs Code, as the Union Customs Code, which it has now presented to the European Parliament and the Council for their agreement. It stated that the changes being made were required by the Lisbon Treaty, and that it would avoid making fundamental changes to the Modernised Customs Code. Unfortunately, it seems that there is some disagreement over the use of the term 'fundamental' which starts with the fact that amongst a number of major changes, the European Commission has decided to amend one of the defining Articles of the Modernised Customs Code, (Article 5.1), which states:

> All exchanges of data, accompanying documents, decisions and notifications between customs authorities and between economic operators and customs authorities required under the customs legislation, and the storage of such data as required under the customs legislation, shall be made using electronic data processing techniques.

The proposed amendment allows the European Commission to exclude one or more Member States from this requirement if they feel the need exists. The standardisation of customs IT systems is one of the basic tenets of the Modernised Customs Code, and to allow the Commission to decide whether one of more Member States can be excluded from this requirement changes one of the pillars on which the Modernised Customs Code is based. Furthermore, it means that business in the EU has to manage different processes in different Member States, as some will use paper and some will have IT systems. This will probably increase costs for customs administrations as they will also have to manage two different processes.

There are also other 'corrections' included in the proposed recast that seemingly exceed the Commission's stated objective to limit such changes to what is absolutely necessary to ensure coherence in the processes. Some of these changes will now inevitably result in the diminution of, and in some cases the withdrawal of, simplifications and facilitations - most notably centralised clearance as originally envisaged in the Modernised Customs Code - that are essential not only to members of AmCham EU, but also to EU business as a whole.

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Attached to our letter is a series of short documents that detail the issues of serious concern to AmCham EU and make suggestions as to how four of them can be addressed within the proposed recast of the Modernised Customs Code.

The fifth issue relating to customs valuation remains under discussion in the context of the Implementing Procedures for the future Union Customs Code, but is considered to be so important to trade that its included here as a reminder to both the European Parliament and the Member States. Given the proposed wide use of 'delegated acts' and the practical difficulties for the European Parliament or Council to block an adopted delegated act, we consider it important to again draw attention to the very worrisome language in the draft Implementing Provisions as consolidated by the Commission in November 2011.

We are available to meet with you at your convenience, and look forward to strong actions from the European Parliament and Member States to ensure that the modernisation of customs as envisaged in the Modernised Customs Code, provides genuine facilitations to all trade sectors in support of the absolute need for business to drive growth in this period of a challenging economic climate.

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1. Customs valuation

Introduction

The EU's rules on customs valuation are based on the legally binding international WTO Customs Valuation Agreement (CVA). These rules provide, inter alia, that the value of imported goods can be based on the so-called transaction value if there has been a sale for export to the importing country. The CVA also provides that royalties and licence fees are to be included in the customs value only if they are a condition of sale. The EU's Customs Code and its implementing provisions honour these principles. However, in the context of the implementing provisions of the MCC, the Commission is planning to amend the rules in these two areas to the detriment of EU businesses and consumers, and without there being a legal or practical need to do so.

Current situation

1. Sale for export: For many years, the EU customs rules - in line with the international CVA - have allowed the use of an earlier sale for export in a chain of successive sales as the basis for customs valuation, provided certain well-established criteria are met (as published at the EU level). The advantage of using such earlier or 'first' sale is that the customs value (on which the amount of import duties and import VAT is calculated) is normally lower (as subsequent sales tend to increase the transaction value, i.e. price), and this is in the interest of traders, user industries importing inputs, and consumers in the EU.

2. Dutiability of royalties and licence fees (R&LF): Under the current EU rules, R&LF paid by the buyer of the imported goods to third party licensors can only be included in the customs value if they are a condition of sale, in line with the CVA and international practice.

Modernised customs code/UCC

1. Sale for export: In the context of the implementation of the MCC, the European Commission is planning to make the use of the 'last' sale obligatory and to no longer allow an earlier sale as the basis for customs valuation. There is no legal need for the EU to amend the current regime under the CVA (which does not even use the 'last sale' concept), and the use of a first sale also remains possible in the United States. There is also no practical need to change the current system, which works well in many Member States. Serious concern has been expressed (repeatedly) by various EU business organisations, numerous EU Member States and the European Parliament.

2. Dutiability of royalties and licence fees (R&LF): The Commission's draft implementing provisions risk leading to the inclusion of R&LF paid by the buyer of the goods to third party licensors in the customs value, even if this payment is not a condition of the sale of the imported goods. This is because the draft language could be interpreted as meaning that payment of any R&LF

by the buyer to any third party would constitute a condition of sale. If provisions are adopted that allow an overly broad interpretation of what constitutes a 'condition of sale' and thus of the dutiability of R&LF, this would be in contravention of the international CVA which clearly states that R&LF can only be included in the customs value if they are related to the goods and if they are a condition of sale.

Impact

1. Sale for export: The envisaged change will not only significantly increase import duties and import VAT amounts at times when business and consumers are already under severe economic strain, but it will also lead to legal uncertainty as the 'last' sale is a concept not defined in EU or international norms.

2. Dutiability of royalties and licence fees (R&LF): If the implementing provisions are adopted in their current draft form, this would increase the customs value of imported goods and hence, the amount of customs duties and import VAT paid by EU businesses and consumers. Furthermore, such broad EU language could 'spill over' and be used by other jurisdictions in their customs valuation rules, which would in turn affect the competitiveness of EU businesses on those countries' markets.

It is essential that the Commission continues to consult with business and Member States to keep in place the possibility to use an earlier sale under certain conditions and to work on language that does not make R&LF dutiable if their payment is not a condition of sale.

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2. Two step clearance procedure for centralised clearance

Introduction

With the approval of the EU Modernised Customs Code (MCC) in 2008 (Regulation (EC) 450/2008), the European Parliament signalled its support for the simplification of EU customs procedures, and the creation of a new pan-European e-customs environment to dramatically increase trade flows and fundamentally improve the effectiveness of Europe's industry. The epitome of this was the concept of Centralised Clearance.

Current situation

Centralised Clearance would allow EU traders to declare goods electronically and pay their customs duties and VAT at the place where they are established. This is irrespective of the Member State through which the goods are brought in or out. The advantage of this is that traders only have to deal with one customs authority for all their imports into the EU. To achieve this objective required that some harmonisation was required to such areas as national prohibitions and restrictions, the collection of VAT and the collection of statistics.

Modernised customs code/UCC

Unfortunately, many Member States are currently resisting the requirement to implement harmonised customs rules, seeking to maintain control of their own processes and procedures to the extent that centralised clearance will be unrecognisable to what was originally conceived in 2008. The arguments being used against the concept of Centralised Clearance range from lack of funding for new IT systems, through security requirements to a fear amongst some Member States that business will move its customs clearance operations to Member States that have a customer service approach in their relationship with business. This creates a very real danger that a scaled down version of centralised clearance will be adopted, with no or minimal benefit to trade. In reality, this means traders will still be forced to send the required customs clearance information to multiple Member States, creating complexity in business operations and reducing efficiency. In summary, a lack of willingness to further harmonise procedures and controls is perpetuating the customs burden on European trade, and is contradicting the underlying objectives of the Modernised Customs Code.

Impact

The withdrawal of the proposed facilitation would take away the biggest advantage for EU business as foreseen in the original MCC. Traders will still be forced to send the required customs clearance information to multiple Member States, duplication of entry processing and customs controls, resulting in possible delays, need for representation in two places, especially for SMEs. The payment of VAT will remain as it is today, creating a need to pay VAT amounts

per shipment in the Member State to which the goods are destined, rather than at a central supervising office.

It is therefore essential to our business that the simplification is retained as proposed in the original MCC, and further work is carried out over the next 8 years to address VAT, national prohibitions and restrictions and statistical requirements,

Proposal

Proposal of the Commission	Proposed amendment
Article 138 2. The customs office at which the customs declaration is lodged shall carry out the formalities for the verification of the declaration, ⊠ and ⌫ the recovery of the amount of import or export duty corresponding to any customs debt 3. The customs office at which the goods are presented shall, without prejudice to its own controls, carry out any examination justifiably requested by the customs office at which the customs declaration ⊠ has been ⌫ is lodged. □ new Those customs offices shall exchange information necessary for the release of the goods. The customs office at which the goods are presented shall allow the release of the goods.	*Article 138* 2. The customs office at which the customs declaration is lodged shall carry out the formalities for the verification of the declaration, the recovery of the amount of import or export duty corresponding to any customs debt **and for granting release of the goods.** 3. The customs office at which the goods are presented shall, without prejudice to its own controls **for security and safety purposes**, carry out any examination justifiably requested by the customs office at which the customs declaration ⊠ has been ⌫ is **lodged and shall allow release of the goods, taking into account information received from that office.** □ **Delete the new added text as follows -** **Those customs offices shall exchange information necessary for the release of the goods. The customs office at which the goods are presented shall allow the release of the goods.**

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3. Reinforcing the single comprehensive guarantee

Introduction

Historically, guarantees have been provided by persons, to cover potential payments of customs duties and other charges to customs before a customs debt has been established and, for deferred payments of customs duties and other charges that occur after a customs debt has been established, i.e. before a customs declaration is accepted, and after their acceptance. Banks and insurance companies are the most common providers of guarantees and they charge a small percentage of the total amount of any guarantee as their annual fee.

Current situation

Since the implementation of the new transit procedures in the mid 1990's, a simplification does exist for authorised traders to have a waiver of a guarantee for goods moving in transit through the EU. The introduction of the status of Authorised Economic Operator (AEO) has done nothing to change this situation, so a company with the status of AEO may operate transit with a guarantee waiver, and then for the same shipment, need a full comprehensive guarantee when the customs debt has been established.

Modernised customs code/UCC

From the very first discussions on the Modernised Customs Code and its implementing procedures, business has stated that it considers that there should be an opportunity to have a single comprehensive guarantee in the EU, subject to a 100% waiver. This issue has been highlighted at every possible opportunity with the Commission, and with the 27 Member States. Unfortunately it seems that despite being audited to ensure the financial viability of companies which apply for the status of AEO, they cannot be trusted to meet their debt to customs.

Impact

The ongoing requirement to provide a comprehensive guarantee for deferred payments will mean that companies which have been granted the status of AEO, will continue to have two different types of guarantees for the same shipments of goods, and will therefore continue to pay guarantors unnecessary charges.
It would provide a genuine benefit to AEO's, if an amendment could be made to the proposed recast of the Modernised Customs Code to provide for a single comprehensive guarantee which could be subject to a 100% waiver for all customs procedures.

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Proposal

Proposal of the Commission	Proposed amendment
Article 62 **Comprehensive guarantee…..** **2. Where a comprehensive guarantee is to be provided for customs debts and other charges which may be incurred, an economic operator may be authorised to use a comprehensive guarantee with a reduced amount or to have a guarantee waiver provided that he fulfils the criteria laid down in Article 22(b) and (C).:**	**Article 62** **Comprehensive guarantee…..** **2. An economic operator may be authorised to use a comprehensive guarantee with a reduced amount or to have a guarantee waiver provided that he fulfils the criteria laid down in Article 22(b) and (C).:**

4. Transit simplification

General statement

Under the existing customs code and its implementing provisions airlines and sea carriers are allowed to use their own systems to control and report to customs all transit movements between European Union/European Free Trade Area air and seaports. Based on an authorisation from customs, the carrier is able to use its own operating system to transmit transit cargo data between the (air)port of departure and destination. This completely electronic simplified process is fully within the spirit of the Union Customs Code (UCC) and as such we see no reason why this cannot continue under the UCC for legitimate traders. Forcing these transit movements into the NCTS system will create red tape for both the customs authorities at the (air)ports and the carriers without any added value.

More detailed statement

1. Introduction

Under Article 445 of Commission Regulation 2454/93, (the implementing provisions of the current Community Customs Code), the Level 2 transit simplification for movements by air may be granted to airlines operating a significant number of flights between Member States and/or EFTA countries that use electronic data interchange (EDI) systems to transmit information between the airports of departure and destination.

Under this procedure an airline is authorised to use an electronic goods manifest as a transit declaration to cover goods placed under the transit procedure. The authorisation sets the data required to be included in the manifest including the normal trade description of the goods and their customs status (e.g. T1, T2, T2F etc.) as well as an obligation for approved carriers to notify the customs authorities of all irregularities. It also places an obligation on the customs authorities to audit the airlines concerned to ensure that the customs requirements are being met.

This simplification was introduced as facilitation for authorised airlines and is vital for the air industry as it allows them to move goods quickly between points in the EU as demanded by business. There is no jeopardy to controls for either security or safety purposes, as these take place prior to shipments being moved within the simplified transit procedure.

Status in the MCCIP

This simplified procedure for authorised carriers has been taken out of the MCCIP without good arguments and replaced by a NCTS declaration. The latter procedure is a very cumbersome and complex system that is not capable in meeting the short time frames in which air operators tend to operate will

result in delaying intra European air movements and considerable increase the cost for both customs and trade without adding any value.

2. Simplified transit procedures for movements by air

As business, we are keen to retain the use of electronic manifests currently provided for in Article 445. These simplifications fully meet the requirements for electronic declarations and they are in fact fully in line with the 'entry in the records concept', which is one of the pillars of the MCC. These procedures allow air carriers and express companies to provide a swift and high level of service to us, which supports the 'just in time' principle upon which many business processes are now based.

Forcing these movements into NCTS, whether or not with reduced data sets, will provide little benefit for any party and may have major implications on system volumetric, at both national and community level. It will add additional cost to business and the consumer in the EU.

The current Articles 445 CCIP provides logical and acceptable provisions that can be brought forward into the MCCIP with little amendment.

Proposal:

Proposal of the Commission	Proposed amendment
Article 196 (4) 4. Upon application, the customs authorities may authorise a person to use simplifications regarding the placement of goods under the Union transit procedure and regarding the end of that procedure.	*Article 196 (4)* 4. Upon application, the customs authorities may authorise a person to use simplifications regarding the placement of goods under the Union transit procedure and regarding the end of that procedure, including ***the use of a manifest transmitted by data exchange systems as a transit declaration by any airline or shipping line that operates a significant number of flights or voyages between Member States.***

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5. Transitional arrangements for exchange and storage of data

Introduction:

The Modernised Customs Code (MCC) was introduced by Regulation (EC) 450/2008. A number of principles formed the basis for this regulation. Amongst those principles was an underpinning one which introduced the mandatory and unconditional use of electronic data interchange between customs administrations and economic operators for a variety of processes, such as declarations for import into and export out of the European Union. The complexity of a number of new introduced concepts triggered a necessary delay in the implementation of the MCC. This delay, in combination with an obligatory adaption of the regulation to the principles of the Lisbon Treaty made the Commission decide to introduce a recast of the MCC which is referred to as the Union Customs Code (UCC).

Current situation

Although the MCC is not implemented at this stage, it did hold an unconditional requirement for the usage of electronic means as described in the introduction. This provision is considered as vital for the economic operators as it creates an unambiguous operating environment and allows for clear procedures in terms of customs processes based on electronic interchange. This was welcomed by both the customs administrations and economic operators as it fully fitted the spirit of the legislator to create a modern and paperless environment for customs processes in the EU.

Modernised customs code/UCC

The UCC now introduced an Article 6 of which paragraph 3 allows for derogation from the unconditional principle of electronic interchange. This undermines the broad spirit and one of the underpinning principles of the modernisation of customs law in Europe. It also represents a potential interpretation as to the existence of a lack of legal certainty and predictability. Although the reasons for this development are not clear it does point in the direction of the current economic situation and a consequent lack of funding for Member States of which some of them might choose not to introduce modernised customs processes and maintain current paper-based procedures. It should, however be understood that, although within the short term a status quo may represent a cost reduction for customs administrations; in the long term it will have major consequences in terms of productivity, quality and cost.

Impact

The impact is situated in different areas. The members of the customs union, which are deemed to act as if they were one, will now potentially work at different speeds, depending on the Member State involved. It will also constitute an obstruction to the anticipated centralised clearance in the EU

where shipments destined for a certain Member State will be cleared in another. For economic operators it will create a need to have duplicate processes in place, either paper-based or electronic-based. This generates considerable extra cost to business in Europe and eventually to the European tax payers. Internationally, this 'pick and choose' approach puts the EU Customs Union at a disadvantage compared to other important trade blocks. AmCham EU therefore requests that this provision be repealed to ensure an application of EU customs processes within the spirit of the Modernised Customs Code as it was originally conceived.

Proposal:

Proposal of the Commission	Proposed amendment
Article 6 (3) The Commission may adopt decisions allowing one or several Member States to use, by way of derogation from paragraph 1, means of exchange and storage of data other than electronic data-processing techniques.	*Proposal to delete paragraph 3.*

* * *

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate U.S. investment in Europe totaled $2.2 trillion in 2010 and directly supports more than 4.2 million jobs in Europe.

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